

OREGON MORTUARY AND CEMETERY BOARD MEETING

800 NE Oregon Street, Conference Room 1E

Portland, OR 97232

SEPTEMBER 24, 2007

FINAL MEETING MINUTES – GENERAL SESSION

(Revised 11/20/2007)

Board Members Present:

Jim Ward, President
Jon Cummings, Vice President
Laura Mather, Secretary / Treasurer
Kevin Korn
Joncile Martin
Lyn Stanger
Pamela Wachter
Robert Wentzel
Diane Bassett-Pohl (via Teleconference)

Staff Members Present:

David Koach, Executive Director
Lynne Nelson, Compliance Manager
Bill Bennington, Investigator
Merill Cray, Investigator
Brandy Cochrane, Investigator
Johanna Matanich, AAG
Carla Knapp, Office Manager / Licensing

Board Members Absent:

Michael Harper
Michael Kimoto

Guests Present:

Wally Ordeman, OFDA - CIA Comm.	Tim Corbett, CAO - CIAC
Mark Stehn, OFDA	Amy Lowery, OFDA
Nancy Felton, CGC / CAO	Don Ballantyne, CIAC (OFS)
Chad Dresselhaus, AFCTS	Scott Logan, CIAC
Rick Bennett, AARP, CIAC	

CALL TO ORDER:

President Ward called the general session of the Oregon Mortuary and Cemetery Board (Board) Special meeting to order at 1:05 pm.

GENERAL SESSION:

After roll call, President Ward thanked everyone for coming to this Special Meeting, for the purpose of meeting with the Consumer-Industry Advisory Committee (CIAC) members and Other Interested Parties. He then asked that David Koach first provide an update from the Governor's Office.

Mr Koach felt that it was imperative that everyone, especially Board members, understand the context within which some decisions were about to be made. By context, he meant the examination of Health-Related Licensing Boards (HRLBs) and their conduct at a statewide level coming from the Governor's Office and the Legislature. The concerns about the Oregon Board of Nursing have been appearing in the newspaper for a couple of years. The general concern with the Board of Nursing had to do with protecting nurses at the expense of the public. It culminated not long ago in the resignation of the Nursing Board's Executive Director and also the termination of the Compliance Manager.

The Governor scheduled a meeting today (September 24, 2007), with the Executive Directors of all HRLBs in Salem. The agenda that Mr Koach received indicated that they would be looking into complaint processes, impaired provider issues, and all sorts of other things having to do with Boards and Commissions. There was indication in the correspondence he received that the Governor's Office is trying to ensure that all the HRLBs have properly focused on their public protection mission.

The Governor's meeting will be hosted by Chip Terhuhn, the Governor's Chief of Staff. Also attending will be Tim Nesbitt, the Governor's Deputy Chief of Staff, Sue Nelson, the Interim Executive Director of the Board of Nursing, Erinn Kelly Siel, the Governor's Human Resources Policy Advisor, Lindsay Ball, the Director of Administrative Services for the state, Sue Wilson the Administrator of Human Resources for the state, and George Naughton, Administrator of the Budget and Management Division. This is an important meeting. Unfortunately, due to the Board's special meeting on the same date, Mr Koach was not able to attend the Governor's meeting.

Mr Koach also reported that the Chair of the House Health Care Committee, Mitch Greenlick, scheduled a HRLB hearing on October 9, 2007. Mr Koach felt that it would be unfortunate if the Board were to be moving in a direction that is 180 degrees opposite of what the Governor's Office and the Legislature determines should be the proper perspective, proper direction for a Board.

Ultimately, decisions as to which direction the Board goes are policy decisions and it falls on the shoulders of individual Board members as public officials to make the decisions.

Since Board members had questions, Mr Koach then provided some background. During the 2005 Legislative session, Representative Tom Butler received a telephone call from one of his constituents, a funeral director. Representative Butler was also provided information indicating that the Board was requiring that the funeral director implement \$100,000 worth of remodeling in order to comply with a Board inspection violation. Clearly, that was untrue. The Board never required that, or anything like that, but that was the information that Representative Butler received. It was an insurance broker who encouraged this funeral director to call and the licensee was also warned that if his identity got out, the Board would retaliate against him. Subsequently, at the Board's budget hearing, Representative Butler made some modest remarks about the inspection issue.

In the course of regular business, one of the Board's inspectors / investigators called the licensee to follow up on an issue that had been going on for months in preparation for an upcoming Board meeting. Immediately, the licensee concluded that was retaliation and informed Representative Butler, who was absolutely convinced that the Board or staff had retaliated against his constituent. Obviously not true, but nevertheless, the Board was branded as not only with being retaliatory, but as heavy handed, punitive, and gestapo-like. Words like gestapo-like are inflammatory to say the least. A lot of other people jumped on the bandwagon and a request for complaints went out and Representative Butler received a number of anonymous complaints about the Board. There were relatively few complaints, five or six or something like that. But what Representative Butler did was go through those five complaints and extract 17 different specifications about the Board and staff and the appearance became reality. There was no substance to the issues, and there was little opportunity for the Board to respond to them because of the confidentiality laws except to say that this was all false. The upshot of the 2005 Legislative session was that the Board was seeking

additional revenue and the message came to the Board from several legislators that this was never going to happen, there was never going to be any revenue increase for the Board without industry support, and that the Board needed to take immediate action to improve relations between the Board and the industry. There were budget notes that we responded to and reports that we made. Representative Butler himself in the end said that the complaints that came forward were small stuff. Mr Koach agreed, and said that any agency, when a request for anonymous complaints went out, would have been proud to get the kind of response that came in, as far as anonymous complaints.

Consequently, there was a meeting of Board members and interested stakeholders in Salem. Staff was told not to attend that meeting, but it was Mr Koach's understanding that one of the outcomes of that meeting was the establishment or the commitment to establish what has since become the CIAC.

Mr Koach then stated that as far as the punitive, heavy-handed nature of our inspection scheme, the Board's Compliance Manager reviewed 20 months of Board inspection reports. From those reports, it appears that Board inspectors find about 1,500 inspection violations per biennium, over a two-year period.

Mr Koach characterized the Board's inspection scheme as first of all, pro-active, secondly, comprehensive and it is certainly informative where licensees are concerned, but the very last thing one could call it is punitive. Of those 1,500 violations, the Board took no disciplinary action. Instead, we requested voluntarily corrective action.

When we are looking at this in context with what is going on in the Governor's Office and the Legislature, Mr Koach thought it important for us to acknowledge that the Board's current inspection process in of itself is subject to criticism as not being sufficient to ensure compliance.

Another aspect of our inspection process that is important to acknowledge is its effectiveness. It is not possible to look at an inspection scheme like ours and measure the kinds of things that don't happen because we have such a comprehensive inspection scheme. One can't prove what didn't happen. However, one can look at things like consumer complaints, investigations that the Board conducts and the kinds of sanctions the Board takes against licensees. Over a 10-year period, assuming there is an average of 31,000 deaths a year, the Board initiated an average of 24 disciplinary actions (DAs) per year. Further, assuming that a license denial is not a sanction against a licensee, as they are an applicant, not a licensee, then there were 15 sanctions per year over a 10-year period. If one further adjusts those figures to account for reprimands, which are glorified warnings, as it really isn't a serious sanction on a licensee, the number of sanctions goes from 15 per year, to 10 a year, which is 0.0003. As far as punitive, gestapo like tactics, no matter what is said about it, the fact remains that the Board takes only about 10 DAs a year, less than one a month.

Mr Koach said that looking at it from a staff perspective, considering the Legislative and Governor's Office focus on the Nursing Board and the question as to whether or not we have the proper perspective with regard to public protection, we don't take action on inspection violations, we simply ask licensees to correct them, and as far as DAs, 10 per year is minimal to say the least.

President Ward thanked him and asked if everyone had a copy of the CIAC's recommendations and staff's written response. He then recognized Joncile Martin.

Ms Martin asked to speak on behalf of the Committee. As a member of the Board and as a member of the Committee, she said that this was not about Representative Butler, it was not about gestapo-style tactics, it was not about another staff position. This Board decided after that October 2006 meeting in Salem that we needed to have a better relationship with the industry. It was clear at that meeting that the industry felt like they hit a wall when they try to talk to us, we don't listen, we don't respond, and we don't answer letters. The Committee was formed so that we could listen to the industry, ask them what they wanted, what would help change things so that they are fair, and protect the consumer. The industry wants clear and transparent rules and laws and inspections that everybody can agree with, that everybody can say yes, this is what we need to do as citizens of this state and as members of the Board. That is what we are trying to do here. We are not trying to gut this program. We are not trying to slam the inspectors and say you can't inspect anymore and don't look at anything. What we are saying, is very simply, make your rules according to what the statutes from the state of Oregon Legislature authorizes you to expect to do. Don't be inspecting issues for other agencies in this state. Let those agencies take care of their own business and we'll take care of ours. She then asked Jon Cummings if he had presented the Committee's letter to the Board President.

Mr Cummings responded in the negative.

Ms Martin said that she had a copy and requested that copies be distributed as a handout.

President Ward thanked her and then said that at the last Board meeting, the Board voted to accept the Committee's recommendations, with the understanding that the Board could later rescind any or all at the next Board meeting. He then requested that Chair Cummings proceed.

Chair Cummings asked if everyone had a copy as he reviewed each recommendation. Before he could continue, Robert Wentzel asked what was the specific legislative mandate that allowed the Board to inspect, and what were we supposed to inspect, and what is the purpose of our inspections.

President Ward responded that the purpose of our inspections was for the protection of public health basically.

Mr Koach then added 'the protection of the public health, safety and welfare,' which goes beyond public health.

Mr Wentzel asked if it specifically mandated us to inspect any particular thing by statute.

Mr Koach responded that the mandate is that the Board shall conduct an inspection at least once every biennium and there is language in the statute that talks about the inspection of facilities and records.

President Ward then acknowledged Rick Bennett.

Mr Bennett then read from ORS 692.320(2): 'Other than areas used as living quarters, the board shall inspect not less than once biennially the facilities and records of funeral establishments, cemeteries and crematoriums and immediate disposition companies and any location in which dead

human bodies may be stored, temporarily held or processed prior to final disposition. Inspection of the records of such locations shall be limited to those records required to comply with this chapter or ORS chapter 432.' Mr Bennett then said that this was one of the key statutory languages of sections that the Committee used to relate to the inspection process.

Mr Wentzel then said it says 'or rules adopted pursuant thereto.'

President Ward recognized David Koach.

Mr Koach said that he had a couple of excerpts from attorney general opinions he would like to read into the record first, and then he would like to hear from Board's Counsel.

First of all, an inspection is a form of an investigation, but we usually don't talk about it in those terms. He then read from an Attorney General's Opinion, dated April 29, 1998, Opinion # 8257: 'Because the purpose of such an inspection is to investigate whether the licensee is in compliance with the applicable statutes and rules, any information obtained by the Board is confidential.'

He continued by reading from a letter that contained advice from the Department of Justice, Assistant Attorney General (AAG) Glenn Pearlman, from 1987 at a time after the Board assumed responsibility for regulating crematories and cemeteries. The powers and duties of the Board had not been amended along with the big changes in the wake of the Omsberg incident, and the Board was concerned at that time because they had this responsibility to license and regulate crematories and cemeteries but they didn't appear to have much authority. AAG Pearlman was responding to a question from the Board's Executive Director, as to whether the record inspection authority of the Board under ORS 692.320 allowed the Board inspectors to inspect prearranged funeral plan trusts. The answer was that the inspection of the records of such locations shall be limited to those records required to comply with this chapter or ORS 432 or the rules adopted thereto. Since ORS 692.180(1) authorizes the Board to take disciplinary action with respect to failure to comply with preneed statutes, the Board does have authority to require the records of those plans to be submitted for inspection. Then AAG Perlman goes on to say that when ORS 692.320 is amended to include the operation of cemeteries and crematories then the Board will also have the authority to inspect the records of the cemeteries and the crematories and take disciplinary action.

Mr Koach then turned to Johanna Matanich, Board Counsel, and asked her to respond to Mr Wentzel's question regarding the scope of the records that the Board has the authority to look at.

AAG Matanich asked Mr Wentzel to be more specific.

Mr Wentzel asked why the statute doesn't specify exactly what the Board's inspectors can inspect.

Mr Koach responded that was why the rules were written, as the statute authorizes the Board general powers to adopt rules with respect to the regulation and operation of funeral homes, cemeteries, crematories, etc.

President Ward then recognized Tim Corbett.

Mr Corbett stated that the Committee tried very hard to differentiate between statute and rule, by going back and looking at the legislative intent of those statutes that we are bound by. The rules are intended to assist in making sure we are complying with the statute. The Committee went back and tried to look really at statutory intent and less so on administrative rules.

Diane Bassett-Pohl asked Mr Corbett what research led them to have an interpretation of the legislative intent was.

Mr Corbett said the history of what was occurring at the time that those statutes were passed and the statutory language itself.

Ms Bassett-Pohl then stated that she was there on the Legislative Committee that drafted the statutes and she was with the Legislature the entire time the laws were passed. The legislative intent was to make sure that regulation happened in order to protect the public health, safety and welfare.

Mr Koach said it appears that there are some general miscommunication and perhaps it's important to understand what the ground rules were, because he didn't think that we were all on the same page. Staff does not make much of a distinction between rule and statute because from staff's perspective, rules have the force of law. There is a process that you go through to establish a rule, in addition to having a public hearing and having the Board pass the rules, the rules go to Legislative Counsel before they are enacted and registered with the Secretary of State. So Legislative Counsel has passed on the rules and part of their function is to establish for the Legislature whether the rule is in fact consistent with legislative intent. There have been times when Legislative Counsel has disagreed. But once Counsel has approved them and they become part of the rules, there is an assumption that there is a statutory authority for that rule or Legislative Counsel would not have allowed it to go through. There may be flaws in our rules, and our rules could be changed to reflect it, but there is a difference between amending a rule or omitting or deleting a rule or writing a new rule and simply ignoring a rule. He then asked Board Counsel to comment on the question of rules versus statutes, does the rule have the effect of law and is that the way the Board should be administering them, or are the rules simply explanatory guidelines that the Board can use to interpret a rule.

AAG Matanich responded that statutes and administrative rules both have the force of law in this state and we assume administrative rules currently adopted are valid.

President Ward then directed Chair Cummings to proceed with the review of the recommendations, reminding the Board that they had already adopted all the Committee's recommendations, and we are going to go through each recommendation in depth with the understanding that we can rescind parts or all of it if the Board was in full agreement.

Chair Cummings then read the Consumer-Industry Advisory Committee's mission statement or statement of purpose: 'The Committee's purpose is to make recommendations that will improve Board effectiveness and efficiency while maintaining consumer protection in statutory intent. The Committee will also make recommendations aimed at improving education within the industry and improving communication between the Board, industry and consumer groups. These broad goals should be used to evaluate Committee recommendations.'

Chair Cummings then read the first recommendation:

All Facility Checklists, generally.

General: There was a general effort to reduce items to those required by statute with some exceptions and recognition of limited resources and a need of increased number of annual inspections. In addition, it was felt that the inspection process should be based on the review of facilities and records and rely less on a questionnaire survey approach.

Remove: Law descriptions that have been printed next to the law's reference number.

Reason: They are unnecessary.

Chair Cummings then said that at our last meeting staff convinced us that that was a good idea to leave those on there.

President Ward recognized David Koach.

Mr Koach said he had a general question about the checklist and the approach and he wanted to ensure that everyone is on the same page as understanding that this is a tool for staff, it was never intended to be a tool for licensees. It has never been a matter of Board policy, it has always been a matter of an internal document that compliance managers, executive directors, inspectors use. We have to have a way to find out whether there has been comprehensive coverage and to give inspectors boilerplate, to help inspectors from having to look all over for rules and regulations. The truth of the matter is that licensees are required to comply with all the rules and regulations. The checklist is absolutely meaningless document from any enforcement or compliance point of view. It has never before been the policy of the Board to tell staff what should be on the checklist.

Chair Cummings responded that the Committee was only trying to pare down the time that the inspector is in the funeral home or in the facility inspecting. The Committee's recommendations are trying to help that process, not that we are doing something with the document itself, it is just an attempt to cut down the time of the inspections, in order to get more inspections performed.

President Ward then recognized Lyn Stanger.

Ms Stanger asked what would happen if an inspector is in a facility and really desires to look at something that is not on the checklist, are they out of compliance, have they broken a rule, is there something that is punitive towards the inspector for doing something that is not on the checklist? She thought that if the Board approves a checklist, it really ties the inspector's hands to actually look at a facility beyond the scope of it.

President Ward asked for comment.

Rick Bennett responded that if he understood Mr Koach's explanation of the current form as simply being a tool, it currently does not necessarily create any kind of a barrier for an inspector to look at other items that might not be covered within that form, and he would assume the same would be

true if there were changes made to that form. However, the form does at least in his mind, kind of highlight certain areas that you do want inspectors to check and this new form or any revisions to the form would be similar. It doesn't currently prohibit inspectors from looking at other areas that might not be covered, as long as it is under the jurisdiction of the Board through either statute or rules.

Ms Stanger then questioned whether it was this Board's responsibility to create or revise a tool, as it almost makes the Board accountable to that checklist as a rule.

Ms Martin then said that the Committee felt that in some cases that staff was inspecting for things which they have no authority to inspect, and that the staff has not been complying with the statutory mandate to do biennial inspection. We as a Committee felt that if we would make recommendations that would get the checklist down to something manageable where the inspections could be completed in the mandated time period that the legislature has said that they have to be completed.

Ms Bassett-Pohl responded that it is very hard to do that when our budget is continually attacked so that we can't keep veteran inspectors, we play musical inspectors all the time, because first we have the funds to fund them, and then we don't, and just like now we don't have the adequate inspectors. It has been extremely difficult.

Ms Martin responded to her by stating that she didn't deny that, but we have to work with what we've got right now.

Mr Korn then volunteered that we need to build the rapport back with the legislators also. He thought that a key part of it too.

Mr Wentzel then said his impression looking at this, is that if you are looking to save time, the major area that they have recommended to save time is the cutting out the inspection for compliance of the Federal Trade Commission Funeral Rule. He said that the other things seem to be relatively minor, something here, something there, but if you are talking about cutting the inspection time in half or something, isn't that all involved in the inspection for compliance with this federal rule.

President Ward said let's address that when we get to it, we need to go through each recommendation.

Mr Koach then said that if something is removed from the checklist, his assumption was that the Board has made a policy decision that staff should look the other way. Now if that is not the case, then we need some clearly articulated guidance for staff as to what is it that has happened to this checklist. Has it all of the sudden taken on the weight of expressed Board policy, should it be a rule? If compliance with the Funeral Rule is removed from the inspection checklists, and staff is told not to look at the price lists, that is, in his view, a most substantial abdication of the Board's responsibility.

With respect to the efficiency, and fulfilling our legislative mandate, he said we did have a plan in place, and it was working. When he put the budget together early in 2006, tables are included that show the legislature what we think we can accomplish. For actuals, we did only 185 inspections during the 2003 - 2005 biennium, largely because of staff turnover, compliance manager turnover,

big cases and things just went side ways. For the 2005 - 2007 biennium, the biennium we just finished on June 30, 2007, he had previously estimated that we would complete 356 inspections of licensed facilities. We actually inspected 457 facilities, more than a 100 more than we actually optimistically estimated. How did we get that accomplished? We re-classified a Licensing Specialist to Inspector. Once we filled that limited duration inspector position, we only had that inspector for seven months during the 2005 - 2007 biennium. And during that same biennium, we not only totally eliminated the investigation backlog, but we actually increased the number of inspections we were doing by 28%.

Lynne Nelson noted for the record that Mr Koach was referring to the inspection statistics handout.

President Ward then asked Chair Cummings to proceed with the review of the Committee's Recommendations.

Chair Cummings said that the Board had previously approved the Committee's initial recommendation to remove the law descriptions that were printed next to the law reference numbers on the checklists, but after further consideration, the Committee decided that staff should have those legal references and descriptions on the checklists, so they won't have a separate book to look them up.

President Ward asked if there was a motion to rescind the Board's previous approval.

Kevin Korn so moved. Pam Wachter seconded. All others were aye and the motion carried unanimously. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: none.

Chair Cummings then read the next recommendation:

Remove "Who cleans the prep room?"

Reasons: The rule will be changed in the future; it isn't practical.

The Committee thought that the rule needed to be changed, because what difference did it make who cleaned the prep room, as long as it is clean.

After discussion of whether it was a rule or a law, was it meant to be a health protection law, whether the rule should be changed before we stop inspecting for compliance in order for everybody to be on even playing ground, where and when did this rule come into existence, whether staff has an obligation to get the message out to all licensees that the Board doesn't care who cleans the prep room, the President then said that once the rules are changed, anything on the checklist is going to automatically change as well.

Mr Bennett also said that the fact is that whether or not it is on the checklist, until the rule is changed, it is still in effect, and the Committee will be making recommendations that the rule be changed, because in their mind, it is less important as to the person who is doing it and more important that the prep room is in fact clean.

Mr Koach then asked what would happen if staff asked him if it was okay to check for compliance with the FTC Funeral Rule, even though the Board removed it from the checklists, and he responded look at it anyway, it is still a law.

Mr Bennett responded that the FTC Funeral Rule as far as inspections goes, is not part of the law, it is part of the rules.

Mr Koach asked Board Counsel for clarification.

AAG Matanich responded that the FTC Funeral Rule is adopted by reference in ORS chapter 692.

Tim Corbett then stated that it was in statute only for investigating complaints, not a mandated part of the inspections.

AAG Matanich responded that as it was grounds for discipline, it is part of ORS chapter 692, so the mandate for inspections is to investigate for compliance with the chapter 692, which includes the Funeral Rule.

President Ward said that this was going to come up later anyway, but at this point, did anybody want to make a motion to take this particular point (who cleans prep room) off.

Lyn Stanger moved to rescind the Board's previous approval to have this item taken off the checklist, as it should remain on the checklist. Mr Wentzel seconded. The motion failed. Those voting in favor: Members Bassett-Pohl, Wentzel. Those voting no: Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward.

Ms Knapp reported that this motion failed, and it will be removed from the checklists.

Chair Cummings continued with the next recommendation that the Board had previously approved. It says:

Remove the question, 1) Does the facility have a manager? and

2) Manager is listed on license: if not how long has (new) manager been at the facility?

Not removed: 3) Is the manager a licensed FSP?

Removed: 4) Does the manager manage other facilities?

And one of the reasons these things could be removed is because you probably already looked that stuff up and already have those answers before you went out there.

After general discussion, President Ward asked if there was a motion to rescind the Board's previously approval of removing this from the checklists. Hearing none, he asked Chair Cummings to continue.

Chair Cummings then read the next Recommendation:

'Have there been any changes of principals?'

Reason: It is a licensing issue. Most regular staff would not understand the statutory definition of principal.

Ms Nelson reported that there were eight occasions where there had been a change of manager, change of principal, without Board notification or approval.

President Ward said that initially we voted to remove that. He asked if there was a motion to rescind it. Hearing none, he said it would remain off the checklists. He asked Chair Cummings to proceed.

Chair Cummings read the next Recommendation into the record:

Remove: Apprentices section.

Reasons: 1) Keeping the needed information related to the logs of an apprentice is the manager's responsibility. 2) There are not adequate resources or time to offer this type of mentoring to managers. 3) If a log is inadequate, it is not a violation so time should not be used by an inspector to assess this.

Ms Nelson reported that there were 17 occurrences of apprentice logs being missing or incomplete for 2006 and 2007 to date.

Mr Koach said that one of the most controversial cases the Board ever looked at was the Paul Brown case, where Mr Brown was applying for a funeral establishment license that the Board ultimately denied. In the course of that investigation, we discovered problems with his apprenticeship logs and the Board subsequently revoked Mr Brown's funeral service practitioner's license. Some of the inspection process is designed to uncover violations, but a lot of it is intended to be proactive.

President Ward then said that the Board had previously voted to remove the apprentices section, he asked if there was a motion to rescind it. He then recognized Lyn Stanger.

Ms Stanger so moved. Ms Bassett-Pohl seconded. There was one other, and the motion failed. Those voting in favor: Members Cummings, Korn, Martin, Mather, Wachter, Ward. Those voting no: Bassett-Pohl, Stanger, Wentzel.

(The Board then took a twelve-minute break.)

President Ward then recognized Robert Wentzel.

Mr Wentzel said he just talked to Joncile Martin during the break, and he said that she believes that our inspectors are only authorized by a particular statute to do a particular type of inspection.

Ms Martin responded that she believed that inspections and investigations were two separate things, and she believed that the FTC Funeral Rule empowers the Board to investigate for FTC violations, but it doesn't appear that it empowers the Board to inspect for FTC violations.

After discussion about inspection authority, Mr Corbett stated that Mr Bennett called FTC and said this is what we are proposing, are there any issues, any concerns, is that an area that you feel will create problems. The response was absolutely not, that is our job.

Mr Koach responded that Board staff also talked to FTC and FTC said that the State of Oregon has the lowest FTC complaint problems in the country because the Board does such a good job of enforcing compliance with the Funeral Rule.

Mr Koach then read an excerpt from testimony before a 1983 Legislative Subcommittee at a point in time when the Legislature was thinking about abolishing this Board altogether.

Ms Mae Yih was the Chairperson of this sunset review panel. There were a couple of people, legislative researchers, who were assigned to investigate whether or not the Board was doing what it should and Chairperson Yih asked this Mr Leonhardt if he believed the Board protected the health and consumer interests of the citizens of this state, did he feel that the Board was doing what it was supposed to do. Mr Leonhardt said no. He went through the minutes of six years' worth of meetings and concluded that mostly what the Board did was joust with one another, anti-competitive advertising issues. Going further, among those who were there was John Bollman, who was the President of the Oregon Funeral Directors Association (OFDA) at the time. President Bollman just happened to be President during this time when they were trying to abolish the Board.

There was discussion then about FTC as one of the things where the legislative researcher said well, it seems to me, to give the Board credit, they are starting to look at itemization issues like those called for in the funeral rule. So President Bollman says in 1983 that there has been mention of the Federal Trade Commission. The FTC had in the previous eight years developed rules and guidelines that were now pending. This was even before the Funeral Rule passed. However, the federal government had no way to enforce those rules on a nationwide basis and therefore was looking to the states to have their regulatory boards enforce those rules and regulations. Mr Bollman said the only complaint you would hear from a funeral director, or the most common concern about the FTC at that time, is that they feel the state could do a better job of regulating than the federal government.

Now, this had been an issue nationwide, about putting the Federal Trade Commissions regulations into statute, which is called codification, where they would codify it. OFDA and other industry groups were adamantly opposed to the codification of this Rule and the principal argument against codification was that all of the states in general, from the licensees' perspective, would rather have their own states regulating and inspecting for compliance with the Funeral Rule. Steve Macy, a licensed funeral director was also present. This was in an effort to avoid having the Board disappear. Mr Macy said if the Board adopted the Funeral Rule, then we would also need someone to inspect for compliance with those rules. This could be included in the current inspections. In 1983, the Board is telling the Legislature, trying, attempting to persuade the Legislature not to abolish it because one of the things we can do better than the federal government is inspect for compliance for the Funeral Rule. And now today this Board is contemplating telling its inspector to turn their head and not look at that anymore.

With respect to the issue of whether or not the Board has authority or an obligation or a duty to inspect for compliance with the FTC Funeral Rule, Mr Koach asked Board Counsel to talk with the

Board about ORS 692.320 which is entitled, Powers and duties, which relate back to ORS 692.180. If in fact it is true that the Board has no statutory authority to inspect for compliance with the Funeral Rule, then we don't have any statutory authority to do it, we shouldn't be doing it.

AAG Matanich responded that the Board has authority to inspect for violations of the FTC Funeral Rule and if it does not wish to have the authority, a legislative concept should be developed. ORS 692.320 authorizes the Board to inspect for violations of chapter 692, and the FTC Funeral Rule is part of chapter 692.

Mr Corbett said you just cited where they can inspect.

AAG Matanich said yes, they are authorized to inspect for violations of chapter 692 under .320. A violation of the FTC Rule is a violation of Chapter 692. ORS 692.180 subjects licensees to discipline for violation of FTC Funeral Rule, so therefore it is a violation of statute to violate the FTC Rule.

Mr Wentzel asked AAG Matanich, do we have some separate authorization, is it another separate statute or is it a rule that we had made that says we are going to inspect for violations?

AAG Matanich responded that the Board has authority under ORS 692.320 to inspect for violations. The question is what is the violation of chapter 692. Because a violation of the FTC Funeral Rule is a violation of the chapter, 692.180 makes it unlawful to violate any provision of the FTC Funeral Rule.

Mr Corbett then said he didn't believe that the Board is required to inspect for the Funeral Rule

Ms Bassett-Pohl then moved to rescind the Board's previous approval to remove compliance with the FTC Funeral Rule. Mr Wentzel seconded. Discussion was called.

Mr Corbett said the Committee did not believe that the FTC Funeral Rule is the single most significant risk to consumers. We believe that it is the darker side. The things that you would discover in regular inspections, related to how bodies are treated, that people are being buried in the correct place, and that people are keeping records of where they are being buried. If bodies are being kept around for more than ten days, all of those things are much more important to consumers, then inspecting for compliance with the FTC Funeral Rule. All that is important, it is covered under the whole process of complaints and poor business practices.

Mr Ordeman then said that at no time have we ever said that our goal is to have them save time on site. The goal has to been to save time. Taking documents back to the office doesn't save you that time, that's not getting to the big picture that we've been talking about.

Ms Nelson reported that of the 1,225 violations found in 2006 and 2007 to date, 300 were FTC violations.

President Ward then said we have a motion and a second on the floor and the question has been called for, removal of compliance with the FTC Funeral Rule.

After general discussion, President Ward asked for a vote. Some others were aye and the motion passed. Those voting in favor: Members Bassett-Pohl, Korn, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: Cummings, Martin.

Chair Cummings then moved to the next Recommendation:

The advertising issue. It says 'Remove advertisement through any media including but not limited to: telephone books, etc.) include either the registered name or its assumed business name and physical address.' And

'All Advertising related printed materials ... shall include the physical location of the facility.'

Reasons: We recommend removing any reference to advertising in the checklist. This creates a potential open-ended area for inspection. For practical purposes, advertising violations should be addressed on a complaint basis.

After discussion, President Ward asked if there was a motion to rescind the advertising recommendation? Hearing none, he asked Chair Cummings to continue.

Chair Cummings read the next Recommendation:

Remove ABN and registered name with Board as registered with the SOS Corporation Division.

Reason: The name used by the facility need only be consistent with how the licensee is registered with the Board. Registration of names with other agencies such as the Corporation Division should not be a concern unless multiple names are being used with the public or the Board.

President Ward asked if there was a motion. Hearing none, he asked Chair Cummings to continue.

Chair Cummings read the next Recommendation:

Remove: Vital Records question about sending it within 10 days.

President Ward asked if there was a motion to rescind this one. Hearing none, he asked Chair Cummings to continue.

Chair Cummings read the next Recommendation:

Remove Preneed questions: 1. Facility registered with DCBS as Certified Provider? Reg # ; 2. Filing Annual Reports with DCBS? 3. PN Salespersons properly registered with Board? 4. Are PN engaging in at need arrangements? 5. List unlicensed practicing personnel. 6. PN Salesperson advising Board of change of address? 7. PN Program includes 'not less than five days to cancel.' 8. Are PN salespersons in compliance with Funeral Rule (giving price lists, etc?)

Replace the above with: 1) Perform records inspection of five preneed sales within last 30 days or last five to only verify that the signer is a properly registered PN salesperson.

Reason: Verifying the salesperson is registered with Board should be the only motivation for reviewing preneed trust contracts. DCBS is responsible for preneed and Insurance Commission is responsible for preneed insurance. The Board only registers salespersons.

President Ward asked if there was a motion to rescind this recommendation. He then recognized Diane Bassett-Pohl.

Ms Bassett-Pohl so moved. Mr Wentzel seconded. Discussion followed. Others were aye and the motion failed. Those voting in favor: Members Bassett-Pohl, Stanger, Wentzel. Those voting no: Cummings, Korn, Martin, Mather, Ward. For the record, Ms Wachter didn't vote.

Chair Cummings continued with the next Recommendation:

Remove 'Does FE have cemetery records.'

Reason: Question is not based on statute or rule and to list cemeteries used by FE is impractical. If the FE has cemetery records, it will be already known by the Inspector.

President Ward recognized David Koach.

Mr Koach stated that this was an efficiency measure, and it would really save time as opposed to spending time. For instance, if we went to a funeral home and conducted an on-site inspection without asking if they were the 'official' custodian of any cemetery records, we could have conducted an inspection of those records as well. We don't know if we don't ask.

Mr Cummings moved that we rescind our removal of the question and to clarify the question rather than taking it out. Mr Wentzel seconded. All others were aye and the motion carried unanimously. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: none.

Chair Cummings continued with the next Recommendation:

Remove 'List cemeteries used by facility.'

Reason: Question is not based on statute or rule and to list cemeteries used by FE is impractical.

After brief discussion, Mr Korn moved to rescind and leave it the way it is. Ms Wachter seconded. All others were aye and the motion carried unanimously. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: none.

President Ward asked Chair Cummings to continue.

Chair Cummings noted that we are moving into the Permanent Records part of the Recommendation:

Remove: Various Permanent Records fields for various types of arrangements and replaced with simplified 'Two Burials' and 'Two Cremations.'

Moved items to this location, or Amended words used in this section: 1) Amended: 'Name of purchaser; Relationship' changed to 'Name of authorizing agent; relationship.' 2) Moved: 'Remains kept longer than ten days?' to this section. 3) Moved 'Are unlicensed persons making at-need arrangements' to this section. 4) Removed: 'SFGSS costs generally consistent with the GPL?'

Reason: Unknown.

5) Removed 'SFGSS has good itemization of packages.'

Reason: The term good itemization is vague and undefined.

After brief discussion, President Ward asked if there was a motion to rescind it.

Ms Stanger moved to maintain # 4 at least. Ms Bassett-Pohl seconded. Others were aye and the motion carried. Those voting in favor: Members Bassett-Pohl, Korn, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: Cummings, Martin.

Chair Cummings then read the next Recommendation:

Remove 'Funeral service practitioner signing final disposition permit.'

Reason: It usually isn't available.

After brief discussion, and hearing no motion, President Ward asked Chair Cummings to continue.

Chair Cummings read the next Recommendation:

Remove 'Citation of the laws next to the requirement fields for Cremation Authorization, Receipt for Cremated Remains; Embalming Authorization in Records Inspection area.

Reason: No need for them.

Chair Cummings then moved to rescind. Mr Korn seconded. All others were aye and the motion carried unanimously. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: none.

Chair Cummings read the next Recommendation:

Remove 'Laws from cover page of Checklist.'

Chair Cummings then moved to rescind. Ms Wachter seconded. All others were aye and the motion carried unanimously. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: none.

Chair Cummings then read the next Recommendation:

Move location of the question: Establishment licenses posted.

After brief discussion, Ms Stanger moved to keep it where it was. Mr Cummings seconded. All others were aye and the motion carried unanimously. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: none.

Chair Cummings continued:

Change: 'Cannot have or sell the following items' to: 'The following items used to perform services should not be located at the facility: Verify the absence of:'

Chair Cummings noted for the record that this was for an immediate disposition company.

President Ward asked if there was a motion to rescind. Hearing none, he asked Chair Cummings to continue.

Chair Cummings then said that this Recommendation has to do with Cemetery and Crematory checklists:

Added: 'Outbuildings inspected.'

Reason: It is likely that any problems related to storage of bodies will be found in outbuildings and shops rather than offices. These buildings should be inspected.

President Ward asked if there was a motion to rescind. Hearing none, he asked Chair Cummings to proceed.

Chair Cummings read the next Recommendation:

Remove '# interments' and '# cremations.'

Reason: This information is not readily available and is not required to be provided as part of inspection.

Hearing no motion to rescind, President Ward asked Chair Cummings to continue.

Chair Cummings read the next Recommendation into the record:

Remove: Entire section of 'Cemetery Authority Procedures / Duties of Sexton' and replace with: 'Is a copy of the permit available? Was permit signed and dated by sexton (cremations excepted).'

Reason: While determining whether a permit was signed and dated can be physically evaluated during inspections, there is no way to determine when the permit was signed or if the tag was inspected. This is an example of a question being asked of a person who may not have been here when the casket arrived.

Compliance Manager Nelson said that this was a very valuable tool for cemeterians and crematory operators that don't know what they are supposed to do, so we were really doing a lot of educating out there, making sure that they are checking that the tag number and number on the Final Disposition Permit are the same prior to accepting remains.

Mr Corbett then self-reported that he has had several instances where he had pointed out to the funeral director that the numbers did not agree. Each and every time, all the funeral director did was cross off the 'incorrect' number, write in the correct number, initial it and hand it back to Mr Corbett. Mr Corbett said that there was no answer for what we are supposed to do in rule or statute and the Committee will be addressing that next. His review of the statutes showed that all the onerous is on the funeral director, all the stuff with cemetery checking the tag and all of that is based on rule. When the original statute was written, there is no responsibility on the part of the cemetery. Your rules make a whole set of responsibilities on cemeteries.

Mr Koach responded that in fact the law says you may not accept those remains in your cemetery unless the numbers do match and if you do accept them, then you are in violation. What you could have done was say to the funeral director, I'm sorry, I can't accept these remains, these two numbers don't match. That is the whole purpose of the paper trail and the paper circuit is to interrupt the process right then and there.

Ms Bassett-Pohl said that in 1985 that was one of the biggest issues that moved forward that legislation was the death certificate. We even figured out what kind of metal to use to go through a retort, and that's why the death certificate and the disc have to match up and those death certificates have to be where they are supposed to be within a certain amount of time because that wasn't being done universally and that was one of the biggest problem in 1985. So that definitely is an issue that is huge and was one of the things that propelled that legislation forward.

Mr Korn then said to Mr Corbett that in the future, have the funeral director contact his funeral home and request a correction affidavit and have it brought to you, that would have been the proper paper process.

Ms Wachter moved to rescind this Recommendation. Ms Bassett-Pohl seconded. Some were aye and the motion failed. Those voting in favor: Members Bassett-Pohl, Mather, Stanger, Wachter, Wentzel. Those voting no: Cummings, Korn, Martin, Ward.

Mr Korn said this was a reminder to staff, send it in if they find one.

Chair Cummings then read the next Recommendation:

Remove: Receipt for Cremated Remains question asked of Cemeterians when FE's deliver cremated remains to the cemetery.

Reason: Not a cemetery requirement.

Since President Ward heard no motion to rescind, he asked if the Board would like to adjourn and continue the next day, or not. After brief discussion, it was unanimous to continue. He then asked Chair Cummings to continue.

Chair Cummings read the next Recommendation:

Remove: Receipt for Cremated Remains question about asked of cemeterians when FE's deliver cremated remains to the cemetery.

Reason: Not a cemetery requirement.

President Ward heard no motion to rescind, he directed the Board to continue.

Chair Cummings read the next Recommendation:

Remove: Cemetery maintenance type funding questions (except 'Is cemetery an Endowment Care facility and is the disclosure printed on the contracts.')

Reason: Time-waster, facility staff won't know and Licensing has this information.

Ms Bassett-Pohl moved to rescind, because if DCBS has asked us to do that, I think that it needs to remain on the list. Ms Wachter seconded. Others were aye and the motion failed. Those voting in favor: Members Bassett-Pohl, Stanger, Wachter, Ward, Wentzel. Those voting no: Cummings, Korn, Martin, Mather.

Chair Cummings read the next Recommendation into the record:

Change: Question from 'The preneed program includes a period of not less than five days for purchaser to cancel their preneed contract.' To: 'Do contracts for preneed property sales or preconstruction sales include a written statement allowing a period of not less than five days for purchaser to cancel the contract for a full refund?'

Reason: 1. The five-day cancellation period on trust contracts is irrelevant after DCBS concluded that trusts are refundable at any time. 2. The five-day cancellation requirement does and should relate to preneed property and preconstruction contracts. This needs clarification in OARs as well.

Discussion followed regarding irrevocable contracts, revocable contracts, five-day cancellation period, what goods were considered delivered, what constitutes delivered, graves, crypts and niches that are in existence at the time of sale are not considered preneed, three-day rule may pertain to the money that is trusted, and why the rules need to be clarified.

Ms Bassett-Pohl so moved to rescind this until there is a clarification . Mr Wentzel seconded. All others were aye and the motion carried unanimously. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: none.

President Ward then asked Chair Cummings to proceed.

Chair Cummings then read the next Recommendation into the record:

Remove: 'Is the cemetery registered with DCBS as Certified Provider?'

Reason: Because it is not within our jurisdiction.

After brief discussion, Ms Stanger moved to rescind. Ms Bassett-Pohl seconded. Some others were aye and the motion carried. Those voting in favor: Members Bassett-Pohl, Korn, Mather, Stanger, Wachter, Wentzel. Those voting no: Cummings, Martin, Ward.

Chair Cummings then read the next Recommendation:

Record of Interment. Remove: Items required by Rule. Remove: 'The name of purchaser because it means the purchaser of mortuary services, not cemetery services.'

Ms Bassett-Pohl moved to rescind. Mr Wentzel seconded. Some others were aye and the motion failed. Those voting in favor: Members Bassett-Pohl, Cummings, Stanger, Ward, Wentzel. Those voting no: Korn, Martin, Mather, Wachter.

Chair Cummings then read the next Recommendation:

Remove: 'Name of cemetery personnel responsible for arrangements.'

Reason: OARs refer to name of cemetery only (not personnel).

Mr Koach said that this has to do with an interpretation of the rule and he believed that AAG Matanich had already confirmed that Board staff is correctly interpreting the rule and he asked her to confirm.

AAG Matanich said certainly it is the most logical grammatical interpretation. Any reasonable interpretation adopted by the Board the court will give to deference to when they are interpreting their own administrative rule.

After brief discussion, Ms Bassett-Pohl moved to rescind this recommendation. Mr Korn seconded. Others were aye and the motion carried. Those voting in favor: Members Bassett-Pohl, Korn, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: Cummings, Martin.

Chair Cummings then read the next Recommendation:

Remove: 'Date of death.'

Reason: It isn't statutory.

Ms Bassett-Pohl moved to rescind, because it is in rule. Ms Wachter seconded. Others were aye and the motion carried. Those voting in favor: Members Bassett-Pohl, Cummings, Korn, Martin, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: Martin.

Chair Cummings then read the final Recommendation into the record:

Remove: 'Name of Cemetery (or Crematory) Personnel responsible for arrangements.'

Reason: Death hasn't occurred so 'arrangements' haven't been made yet.

Mr Corbett said that the Committee's reason was that there was no statutory requirement for that, and we are going to recommend changing the rule.

President Ward asked if there was a motion to rescind.

Mr Korn so moved. Ms Bassett-Pohl seconded. Others were aye and the motion carried. Those voting in favor: Members Bassett-Pohl, Korn, Mather, Stanger, Wachter, Ward, Wentzel. Those voting no: Cummings, Martin.

Ms Bassett-Pohl then stated that the City of Clatskanie's three small cemeteries were recently inspected not long ago, and she asked her staff how it went. They were absolutely pleased. They don't have a problem with the rules, they don't feel that they are oppressive and have had no problems with the inspectors or the inspections.

President Ward thanked everyone for their time and attendance. The meeting was adjourned until the next day.

ADJOURNMENT - The general session was adjourned at 5:32 pm.